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No. 90-548

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1990

DAVID L. FOSTER, by his Guardian
ELIZABETH L. FOSTER,
Plaintiff-Appellant,

Petitioner,

v.

UNITED STATES FIRE INSURANCE COMPANY
Defendant-Appellee,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Trial Court and Court of Appeals Properly Ruled Under Virginia Law That a Funeral Home Did Not Have Coverage as an "Insured" Under a Personal Catastrophe (Umbrella) Policy Issued to the Owner of the Funeral Home Who Declined to Purchase a Similar Umbrella Policy for the Funeral Home Itself?

II. Whether This Case, Involving State Law Issues and Specific Facts and Insurance Policy Language, Merits Review by This Court Under Rule 10.1 of the Rules of the United States Supreme Court?

LIST OF PARTIES AND RULE 29.1 LIST

The petitioner in this case is David L. Foster, by his Guardian Elizabeth L. Foster, who was the plaintiff-appellant below. The respondent is United States Fire Insurance Company, defendant-appellee below.

United States Fire Insurance Company is a New York Corporation, a wholly owned subsidiary of Crum & Forster, Inc., a New Jersey Corporation. Crum & Forster, Inc., a New Jersey Corporation, is a wholly owned subsidiary of Xerox Financial Services, Inc., a Delaware Corporation, which is a wholly owned subsidiary of Xerox Corporation, a New York Corporation.

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STATEMENT OF THE CASE

This case involves a state law insurance issue. The Fourth Circuit Court of Appeals, by a unanimous, unpublished, per curiam opinion, affirmed the trial court's ruling denying coverage under the terms of the applicable umbrella policy.

Petitioner, David L. Foster (Foster) was a passenger in a van owned by Collins Funeral Home, Inc. (Funeral Home) and driven by its employee, David Clark, when it was in a single vehicle accident. Foster sued Funeral Home, Clark and Mr. William Collins (Collins), the owner of Funeral Home, contending that Clark was acting as Collins' "personal agent." The case against Collins was rejected by the trial court and Foster nonsuited Clark. Foster proceeded solely against Funeral

Home and obtained a judgment for $750,000.00.

Foster then filed this suit in federal court for declaratory relief, seeking an adjudication that a personal catastrophe umbrella policy issued by United States Fire Insurance Company (U.S. Fire) to Mr. and Mrs. Collins afforded excess coverage to Funeral Home for the accident in question. The case was tried before the Court, without a jury, upon the pleadings, exhibits and a deposition of Harry Fletcher Smith, Jr. (Smith), the insurance agent who procured the umbrella policy for Collins.

By Order (and Memorandum Opinion) of April 21, 1989, the Trial Court held there was no umbrella coverage for the Funeral Home. The district court's opinion appears at pages 18-29 of the Appendix to Foster's Petition

(hereinafter "App. ___".) Foster filed a Motion to Alter or Amend the district court's decision pursuant to Federal Rules of Civil Procedure 59(e) and 52(b) which was denied by the district court. (App. 31-38.)

The Fourth Circuit Court of Appeals affirmed the trial court by a unanimous opinion which appears at pages 1-13 of the Appendix to Petitioner's Petition. Foster's Petition for Rehearing also was denied by the Court of Appeals. App. 14-15.

STATEMENT OF FACTS

The car accident for which Foster recovered a $750,000 state court judgment against Funeral Home occurred on April 26, 1984.

Funeral Home was covered by a Business Auto Insurance Policy issued by United States Fidelity & Guaranty Company

(U.S.F.&G.), effective May 9, 1983, insuring two (2) hearses and two (2) sedans. (Joint Appendix on appeal at page 134, hereinafter "JA ___".) On June 17, 1983, the van involved in the accident at issue was added to the policy. (JA 133.) This policy was renewed the following year, was in effect on the date of the accident, and afforded $300,000.00 coverage for operation of the van to Funeral Home and its driver, Clark.

Following the state court verdict, U.S.F.&G. paid $300,000.00 on the judgment obtained by Foster against Funeral Home. (JA 75-76.)

Pennsylvania National Mutual Insurance Company (Penn National) issued a policy to Funeral Home which insured two other vehicles. Mr. and Mrs. Collins did not own any automobiles; they used

these vehicles, titled in the name of Funeral Home, as their own. (JA 61-62.) The Penn National policy was endorsed to provide "drive other vehicles" coverage for Mr. and Mrs. Collins. Thus, they were provided liability protection as if they owned the vehicles and the policy were issued to them. (JA 66.) The Penn National policy did not provide coverage for the Funeral Home's van, hearses or sedans which were covered under the U.S.F.&G. policy.

Collins obtained a personal catastrophe umbrella policy for himself and his wife which is the subject of this litigation. He obtained the personal umbrella policy through insurance agent Smith who previously had given a quote for a similar policy to Mr. Albert Prillaman with whom Collins jointly owned a rental house. (JA 56-59.) Collins met

with Smith and provided all necessary information for obtaining the personal umbrella coverage. (JA 58.) The insureds are listed on the insurance application as William A. Collins and Susan A. Collins. In addition to their residence in Franklin County, the application notes two other residences, rented to others: one at Fripp Island, S.C., and another jointly owned with the Prillamans at 124 N. Daniel Creek Road, Collinsville, Va. (JA 96.)

The Schedule of Underlying Insurance for the umbrella policy was prepared by the Underwriting Department, based on data in the application. (JA 79, 80.) The U.S. Fire umbrella policy listed three underlying policies in the Schedule of Underlying Insurance. One policy was a homeowner's policy issued to William and Susan Collins by U.S.F.&G. A second

was an owner/landlord policy issued by U.S.F.&G. to William Collins and Albert and Carol Prillaman to cover jointly owned rental property in Collinsville. The third listed policy was the automobile policy issued by Pennsylvania National Mutual Casualty Insurance Company ("Penn National") to cover William and Susan Collins use of the two Funeral Home vehicles routinely used by them as their own.

As of the accident date, the U.S. Fire policy, a "personal umbrella policy", was still in effect and the scheduled (listed) underlying policies were the same. (JA 72.) There is no dispute that none of the underlying policies listed on the schedule provided coverage to Funeral Home for the accident in question.

Collins expressly declined to purchase an umbrella policy for his business, when Smith, the insurance agent, talked to him about one. (JA 76-77.) Foster contends that Funeral Home is an insured for the accident in question under the terms of Collins' personal umbrella policy. The courts below held to the contrary.

REASONS FOR DENYING THE WRIT

I. The Central Issue in This Case Was Correctly Decided Below: The Lower Courts Properly Determined That Funeral Home is Not an Insured Under Collins' Personal Umbrella Policy.

Collins purchased a personal umbrella liability policy for himself and his wife, but declined to purchase similar umbrella liability coverage for Funeral Home. (JA 76-77.) Collins' personal one million dollar umbrella policy provides coverage only to

"insureds" within the meaning of the policy. The sole issue in this case is whether Funeral Home is to be identified or included as an insured on Collins' personal umbrella policy.

The policy defines "Insured" as follows:

> The unqualified word insured includes:
> (a) The named insured;
> (b) any relative in the same household as the named insured;
> (c) any other person under the age of 21 in the care of the insured; and
> (d) to the extent that underlying insurance affords coverage, to any other person or organization included as an insured in any Underlying Policy listed in the Schedule of Underlying Insurance attached to this policy.

(JA 11) (emphasis added.)

There is no policy listed on the umbrella policy's Schedule of Underlying Insurance under which Funeral Home was covered for the accident in question. There is no dispute that the U.S.F.&G.

policy under which Funeral Home did have coverage for the accident is not listed on the Schedule of Underlying Insurance.

Foster argues that Funeral Home, nevertheless, was an insured for coverage under Collins' personal umbrella policy because Funeral Home was an insured in another policy (Penn National) that was listed in the schedule even though the Penn National policy did not provide coverage for the accident. [1] As stated by the trial court, Foster's strained reading is untenable:

> In other words, the plaintiff wishes to construe the phrase 'to the extent that underlying insurance provides coverage' in subpart (d) to mean that, to the extent <u>any</u> insurance provides coverage for an accident, <u>anyone</u> who qualifies

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[1] As noted above the Penn National policy insured the vehicles owned by Funeral Home but driven by Mr. and Mrs. Collins as their own. It did not provide coverage for the van involved in the accident.

> as an insured in any listed underlying policy is covered under the umbrella policy even though the listed policy under which the person qualifies as an insured does not cover the accident.

(App. 24) (emphasis in original.) [2]

The absurdity of Foster's position becomes apparent by reference to a hypothetical. If, for example, under Foster's logic, Collins had listed an owner/landlord policy in the schedule of underlying insurance, and twenty co-owners were listed as insureds under that owner/landlord policy, those twenty co-owners would have umbrella coverage for auto accidents for which they had separate, unlisted insurance policies.

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[2] In essence Foster seeks to eliminate the phrase "to the extent that underlying insurance affords coverage" from the subpart d definition of "insured" and to extend coverage to any entity which could receive coverage under a listed policy regardless of whether the listed policy "affords coverage" for the accident at issue.

As the trial court observed, such an outcome would be ludicrous. (App. 25.) As Virginia law makes clear, "absurd results" in construction of insurance contracts are to be avoided. Transit Casualty Co. v. Hartman's Inc., 218 Va. 703, 239 S.E.2d 894 (1978).

The outcome sought by Foster also would be inconsistent with the intent of the parties to the insurance contract. In construing or interpreting an insurance policy courts must ascertain and effectuate the intention of the contracting parties. The Court must place itself in the position of the parties when the contract was entered into and consider the purposes, subject matter and circumstances under which the parties' minds met. Jackson v. North American Assurance, 212 Va. 177, 183 S.E.2d 160 (1971).

Neither Foster nor Funeral Home were a party to Collins' umbrella insurance contract.

Collins, at the time his co-owner (Prillaman) of rental property applied for an umbrella policy, told agent Smith he was interested in such a policy. Subsequently, Collins applied for and received a personal umbrella policy. Either before or soon after it was issued, Smith talked to Collins about a business umbrella policy for the funeral home. Collins did not desire such a policy. (JA 76-77.)

Indeed, Foster never contends that the parties intended that the umbrella policy provided coverage for accidents such as the one in this case. Foster contends only that the language of the umbrella policy is ambiguous and, therefore, should be construed against

the drafter, U.S. Fire, no matter how unfair or absurd the result. In Virginia, however, the rule of reason governs in construction of insurance contracts and even if ambiguities in policy language are alleged, courts are not permitted to adopt a construction not justified by the intent of the parties. See Atlantic Life Ins. Co. v. Bender, 146 Va. 312, 131 S.E. 806 (1921); Phoenix Indemnity Co. v. Anderson, 170 Va. 406, 196 S.E. 629 (1938); First American Title Ins. Co. v. Seaboard Sav. & Loan Assoc., 227 Va. 379, 315 S.E.2d 842 (1984).

Moreover, as the trial court properly determined, the umbrella policy in this case is straightforward and unambiguous. Where the language of a policy is unambiguous, the words must be given their ordinary meaning. Atlas Underwriters, Ltd. v. Meredith-Burda,

Inc., 231 Va. 255, 259, 343 S.E.2d 65, 68 (1986).

When the policy is viewed in its entirety, as it must be (Suggs v. Life Insurance Co. of Virginia, 207 Va. 7, 147 S.E.2d 707 (1966)), there is no doubt that the reading urged by Foster is not the reading contemplated by the parties. A review of the umbrella policy reveals that when the parties intended to extend the meaning of the phrase "underlying insurance" to include unscheduled underlying insurance, the language utilized was "any other underlying insurance."

Use of this language appears in several places; for example, on page three under "supplementary payments" (JA 10): "With respect to any occurrence not covered by the underlying policies or insurance described in the Schedule of

Underlying Insurance attached or any other underlying insurance available to the insured. . . ." On page five (JA 12), again, the policy states the intent to include unscheduled insurance policies in defining "retained limit": "the total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance, and the applicable limits of any other underlying insurance available to the insured. . ." (App. 27.)

As the trial court found in analyzing the definition of "insured": "In contrast, subpart (d) under the definition of 'insured' does not use the phrase 'any other underlying insurance,' and in the context of the definition, it is clear that the unmodified phrase 'underlying insurance' means 'underlying listed insurance'." (App. 27) (emphasis in original.)

The trial court properly found the language of subpart (d) to be unambiguous. (App. 27.) The Funeral Home accident was not covered by the umbrella policy because Funeral Home's U.S.F.&G. policy was not listed as underlying insurance in the umbrella policy. No policy listed on the Schedule of Underlying Insurance afforded coverage to Funeral Home for the accident at issue. To hold that Collins' personal umbrella policy afforded coverage to Funeral Home under these circumstances would be to rewrite the agreement of the parties.

II. This Properly Resolved Case, Involving State Law Issues and Specific Facts and Insurance Policy Language, Does Not Merit Further Review by This Court.

There is no need for this Court to exercise its power of supervision under Rule 10.1(a) of the Rules of the Supreme Court where the decisions below justly and properly resolved this case. Foster does not so much argue that the wrong result was reached, but contends that the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) was wrongly applied to the trial court's conclusions. Suffice it to say that the trial court's analysis was buttressed by critical factual issues which were virtually undisputed. First, Collins flatly rejected obtaining an umbrella policy for Funeral Home (JA 76-77). Moreover, the intent of the parties to the contract, in light of surrounding circumstances, was

that the accident in question should not be covered under Collins' personal umbrella policy. The trial court specifically observed that Foster "does not contend that William and Susan Collins believed that their umbrella policy provided coverage for accidents such as the one in this case." (App. 25.) The lower courts' decisions properly adhered to the intent of the parties and the language of the policy.

The petition also is inappropriate for further review because it does not involve issues of broad precedential value. The underlying issue involves a pure state law question which hinges on the specific facts and applicable policy language of this case.

After fully considering the policy language and surrounding circumstances, the courts below properly declined

Foster's invitation to redraft Collins' policy in a manner wholly inconsistent with the intent of the parties to the contract. That decision is in keeping with Virginia law and does not require further review.

CONCLUSION

The courts below correctly resolved the state insurance law issue involved in this case. For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was sent by first-class mail to counsel for petitioner, Fred D. Smith, Jr., Fred D. Smith, Jr., P.C., 7814 Carousel Lane, Suite 400, Richmond, Virginia 23294, this 19th day of October, 1990.

Frank Friedman